Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. ...78-1900

WILLIAM R. SMYER and BYRON R. MAY,

Petitioners,

vs.

UNITED STATES OF AMERICA

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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2. The decision of the court of Appeals for the Tenth Circuit denying the defendants right to a jury trial where charged with and convicted of 11 counts of violating the Antiquities Act, 16 U.S.C. 433 is contrary to Article 3, Section 2 of the Federal constitution and the Sixth Amendment to the United States Constitution.
3. The District Courts decision requiring the Defendants to make a choice between waiving venue already established or waiving their right to a jury trial is contrary to Article 3, Section 2 of the Federal Constitution and the Sixth Amendment to the Federal Constitution.
4. The intentional suppression of evidence by the assistant U.S. Attorney contrary to discovery required under 28 U.S.C. Rule 16 (a) (1) (A), (C), & (D) of the Federal Rules of Criminal Procedure and the intentional misrepresentations as to the existence of evidence later presented violates the due process clause of the 14 Amendment and of the 6th amendment of the United States Constitution.
5. The admission of evidence obtained from the defendants by, what would reasonably be perceived by them as threats and promises, is in violation of the defendants right against self incrimination of the 5th Amendment of the United States Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioners,

vs.

WILLIAM R. SMYER and
BYRON R. MAY,
Respondents.

No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Respondents pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered on April 2, 1979.

REFERENCE TO OPINIONS AND REPORTS BELOW

The opinion of the United States District of New Mexico denying respondent's motion to dismiss is printed in Appendix B hereto and is unreported. The opinion of the Court of Appeals, which affirmed the judgment of the United States District Court of New Mexico, is printed in Appendix A hereto and is to be reported in the official reports.

JURISDICTION

The judgment of the Court of Appeal, printed in Appendix A hereto, was made and entered on April 2, 1979. The order denying rehearing was made and entered on April 30, 1979. Court of Appeals stayed its mandate for 30 days on May 18, 1979, pending the filing of a petition for a writ of certiorari and a final determination thereon by this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

THE QUESTIONS PRESENTED

1. The Antiquities Act Section 16 U.S.C. 443 is constitutionally vague. The ninth circuit in U.S. vs. Diaz held the statute unconstitutional as vague. The tenth circuit in the case held this statute constitutional. 28 U.S.C. 2403 may be applicable.

2. The decision of the Court of Appeals for the Tenth Circuit denying the defendants right to a jury trial where charged with and convicted of 11 counts of violating the Antiquities Act, 16 U.S.C. 443 is contrary to Article 3, Section 2 of the Federal Constitution and the Sixth Amendment to the United States Constitution. Potential sentence was 33 months, actual sentence is 90 days.

3. The District Court's decision requiring the Defendants to make a choice between waiving venue already established or waiving their right to a jury trial is contrary to Article 3, Section 2 of the Federal Constitution and the Sixth Amendment to the Federal Constitution.

4. The intentional suppression of evidence by the Assistant U.S. Attorney contrary to Rule 16 (a) (1) (A), (C), & (D) of the Federal Rules of Criminal Procedure, and the intentional misrepresations as to the existence of evidence later presented, violates the due process clause of the 14th Amendment and of the 6th Amendment of the United States Constitution.

5. The admission of evidence obtained from the defendants by, what would reasonably be perceived by them as threats and promises, is in violation of the defendants' right against self incrimination of the 5th Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The statutory provisions involved are the constitutionality of 16 U.S.C. 443, the Requirements of 28 U.S.C. 16 (a), (1), (A), (C), and (D) as to pre-trial discovery and 28 U.S.C. 18 as to venue of the Federal Rules of Criminal Procedure. The constitutional provisions involved are Article 3, Section 2 of the Federal Constitution, the 6th Amendment for the Federal Constitution as to the right of the jury trial, the due process clause of the 6th and 14th Amendments of the U.S. Constitution and the self-incrimination clause of the fifth amendment of the U.S. Constitution.

These provisions are printed in Appendix C hereto.

STATEMENT OF THE CASE

On November 15, 1978 the defendants, May and Smyer were each charged with 11 counts of violating the Antiquities Act, 16 U.S.C. 433 and carrying a potential penalty of 990 days in prison. Trial by jury was set in Albuquerque on December 12, 1978 but was vacated and reset for January 6, 1979 in Las Cruces after the court granted the defendants' motion for change of venue to Las Cruces as the most convenient forum for the Defendants and their witness. A few days prior to the trial the defendants discovered for the first time that the trial in Las Cruces was not set for a jury trial. The defendants signed a waiver of jury trial only after the District Court's decision requiring the defendants to make a choice between waiving venue in Las Cruces or waiving their right to a jury trial. Las Cruces is approximately 60 miles from the acts charged and place of Defendants' Residence. Albuquerque is approximately 210 miles from Defendants' residence and place of acts charged. The most convenient forum for the trial was Las Cruces and the defendants did not believe they could get a fair trial in Albuquerque due to the prejudicial publicity and the hardship and inconvenience to their witnesses. It was on this reason that the court changed the venue to Las Cruces at the December 6, 1978 hearing.

16 U.S.C. 433, the Antiquities Act, is constitutionally vague and indefinite. The United States vs. Diaz 499 F 2d 113 (Ninth Circuit 1974) antiquities were defined by government experts as being items as much as five years old with cultural or religious significance. Government witnesses in the present case defined an antiquity as any object over 50 years old regardless of cultural or religious significance. Although federal agents thought it to be usual to give a warning prior to charging a person with violating the Antiquities Act, defendants had never been warned against digging. The government had constructed a large 2½'x2' sign on the roads on both sides leading to where the Defendants were digging informing the public they were "Entering Private Property." Government witnesses testified that these signs were

constructed only when the property had been surveyed to reflect that it was private property. It is not against Federal law to dig on Private Property. Antiquities signs warning the public against digging, were supposed to be placed on the sites in question, and on the roads leading to the sites because there had been previous digging on the sites and the sites were located in visual proximity to the road. Although Antiquities signs were available at the Ranger Station and although an antiquities sign had previously been on one of the site, two years before a cow had knocked over the sign and it had not been replaced. There were no antiquity signs on the sites in question nor on the road leading to the sites in question from the south, although there was a 6 inch by 8 inch sign for people coming from the north. The roads leading into the sites were within visual view of the U Bar Ranch and under the apparent control of the U Bar Ranch. The defendants reasonably believed they were on private property.

At the hearing on the defendants' motion for discovery and for a bill of particulars on December 6th the government responded in writing and orally that they had complied with all discovery. From the government responses of compliance with all discovery, the court denied an order for discovery. At trial on January 6th it was discovered that the scientific reports of Steven Martin as to whether the sites were on private property or federal property as would be necessary for proof of a violation of the Antiquities Act was not disclosed in violation of 28 U.S.C. 16 (a) (1) (D) of the Federal Rules of Criminal Procedure and representation made that there was no such proof. A map reflecting the purported location of the sites relative to federal and private property was also admitted over objection contrary to 28 U.S.C. 16 and as being hearsay. A xerox copy of the general location provided to the defendants reflected that the prosecution intentionally removed designations on the copy furnished to Defendants as to the precise locations of where the sites were located relative to Federal and Private Property and the signs constructed by the Government informing the public they were entering private property. The Bill of Particulars primarily requested information as to the exact location of the digging sites to Federal and private property. At trial it was also discovered that the prosecution had intentionally

suppressed statements made by the defendant May recorded in government witness reports and testified to over objection at trial, contrary to 28 U.S.C. 16 (a) (1) (A) of the Federal Rules of Criminal Procedures.

Defendants confessions and items identified in Counts III thru XI should have been suppressed. The uncontradicted testimony reflects such items were obtained through what amounted to threats and promises. The statement of Mr. May was obtained while at the City police station; and while Mrs. May was refused admittance to the interview that lasted up to two hours. Mr. May thought the Miranda rights allowed him the right to remain silent and the right to an attorney but did not understand the information would be used against him, in light of the promises of leniency made him. Although the Officer denies making threats and promises, the uncontradicted testimony as to what was told the defendants May and Smyer would be considered as threats and promises by any reasonable person. It is testified that the officer told the defendant May that he could have an archeologist come into the site and say the damages done on it could run as high as $30,000 and he could be prosecuted for the damages, and that May could also be charged with a felony for wrongful possession of a firearm. The officer admits discussing another crime, admits having turned over May's rifle to Alcoholic, Tobacco and Firearm's people and admits telling May that possession of the same could be considered a felony. May testifies that Dresser told him that if he cooperated 100 percent, Dresser would go with him and would recommend leniency to the court. It is uncontradicted that Officer Dresser indicated to both defendants that they would probably only get a fine and no sentence, that the government had an unlimited amount of money and that things would go smoothly if they cooperated 100 percent and that they could confiscate and tie up May's truck for 4 to 5 years if they didn't cooperate. May's initial cooperation earned the release of the truck. The District court denied the defendants' motion to suppress at the evidentary hearing on December 6, 1978.

REASONS FOR GRANTING THE WRIT OF CERTIORI

This petition considers the constitutionality of 16 U.S.C. 433. There is a direct conflict between the Ninth Circuit Courts and the Tenth Circuit Courts, to the constitutionality of 16 U.S.C. 433. The conflict between the different Courts of Appeals regarding the constitutionality of this statute raised substantial and important questions which should be resolved by the Supreme Court. There is a principle that a criminal statute give fair warning of the conduct it makes a crime and is vague when it exposes people to some risk or detriment without giving the individual fair warning of the nature of the prescribed conduct. Rowan v. U.S. Post Office Department, 397 U.S. 728, 25 L Ed 2d 736; 90 S. Ct. 1484, : (1970); Bowey v. Columbia, 378 U.S. 347, 12 L Ed 2d 8904 84 S. Ct. 1697 (1964). Vagueness in definition as to what an "antiquity" is, caused arbitrary enforcement. In this case those enforcing the statute define an "antiquity" as anything over 50 years old, regardless of cultural or religious significance. In United States v. Diaz, 499 Fed. 2d 113, (Ninth Circuit 1974), the enforcement officials defined an "antiquity" as anything up to 5 years of age with cultural or religious significance.

Under such circumstances, the Ninth Circuit held the statute was unconstitutional as being vague. In construction of the penal statute, all reasonable doubt as to its meaning should be resolved by strict interpretation in favor of liberity of the citizen. Harrison v. Vose, 9 How. 372, 13 L Ed 179; U.S. v. Resnick, 299 U.S. 207, (81 L Ed 127) 57 S. Ct. 126, (1936). The statute is vague for lack of definition of an "antiquity" allowing arbitrary and discriminatory enforcement by officers contrary to the principals of Grayned v. City of Rockford, 408 U.S. 104, 33 L Ed 2d 222, 227, 92 S. Ct. 2294 (1972), and in failing to give fair notice to the public.

II

This petition also raised substantial and important question concerning the administration of justice in the Federal Courts. This Court has previously established where the authorized penalty is in excess of 6 month, a jury trial should be afforded.

Except as to contempt cases, there are a line of cases from this Court that established that the severity of the maximum authorized penalty is one consideration the Supreme Court has held would require a jury trial. Baldwin v. New York, 399 U.S. 66, 26 L Ed 2d 437, 90 S. Ct. 1886 (1970); Ballen v. Georgia, 435 U.S. 223 55 L Ed 2d 234, 98 S. Ct. 1029 (1978). See also annotation "Distinction between petty and serious offences for purposes of federal constitutional right to trial by jury - Supreme Court" cases 26 L Ed 2d 916. The present case has an authorized penalty of 990 days.

Besides the actual penalty potential to be imposed, this court has also considered "the seriousness with which society regards the offense" regardless of the potential penalty as requiring a jury trial. District of Columbia v. Claus, 300 U.S. 617, 81 L Ed 843, 57 S. Ct. 660 (1937). To this extent, it is interesting to note that there is present pending legislation before congress authorizing a fine of up to $100,000 and making this offense a felony. Prior to this court's decision in Scott v. Illinois, S 9 L Ed 2 383 decided March 5, 1979 there was no question that the right to a jury trial existed for the defendants. The significance of Scott in deciding the defendants right to an attorney being dependent upon actual imprisonment, draws into direct question whether a defendant's right to a jury trial is dependent upon whether the actual sentence is 6 months or less. The Tenth Circuit in this case extended the application of Scott to the right to a jury trial by upholding the denial of a jury trial where the defendants were actually sentenced to 3 months but could have been sentenced to 33 months. Until this court clarifies the significance of Scott as to the right of a jury trial, there will be continuing uncertainty as to the right to a jury trial.

The waiver of a jury trial should not be valid where conditioned upon waiving the constitutional right of venue. Venue was properly changed by the District Court persuant to 28 U.S.C. 18 of the Federal Rules of Criminal Procedure to the most convenient forum, and to the District Court at Las Cruces. Requiring the defendants either to waive their right to a jury trial in Las Cruces or require them to have a jury trial in Albuquerque and waive

their right to the trial in Las Cruces placed the defendants in the untenable position of requiring them to choose which constitutional right they would have to waive. Since a jury trial could easily have been held in Las Cruces it is unknown why any waiver was necessary. The right to venue in Las Cruces had been set by the District Court's decision in compliance with 28 U.S.C. 18. The right to retain the proper venue is of fundamental constitutional dimension as reflected in Article 3, Section 2 of the Federal Constitution and under the Sixth Amendment. Hyde v. United States, 225 U.S. 347, 348, 56 L Ed 1113, 1132, 32 S. Ct. 793, (1911); Platt v. Minnesota Mining and Manufacturing Company, 376 U.S. 240, 11 L Ed 2d 674, 84 S. Ct. 769, (1964); United States v. Cores, 356 U.S. 405, 2L Ed 2d 873, 78 S. Ct. 875, (1958). To waive a trial by jury the waiver must be through the exercise of an uncoerced will and be voluntary. The court should indulge every reasonable presumption against the waiver of a fundamental constitutional right. Patton v. United States, 281 U.S. 276, 312, 74 L Ed 854, 870, 50 S. Ct. 253, (1930); Johnson v. Zerbst, 304 U.S. 458, 464, 82 L Ed 1461, 1466, 58 S. Ct. 1019 (1938); Carnley v. Cochran, 369 U.S. 506, 512, 515, 8 L Ed 2d 70, 76, 77, 82 S. Ct. 884 (1962).

III

The defendants' rights to due process and a fair trial of a criminal charge against them are seriously jeopardized by the intentional suppression of evidence and misrepresentation as to the existence of such evidence by the Assistant U.S. Attorney. The misrepresentation as to the existence of the evidence remitted at trial over the defendants' objection was misleading to the defendants and greatly hampered their ability to prepare for the surprise evidence. Such suppression jeopardizes the defendants' ability to verify the truth of the information presented, to prepare for and cross examine witness or to present their own evidence in rebuttal.

At the hearing on the defendants' motion for discovery and for a bill of particulars on December 6th the government responded in writing and orally that they had complied with all discovery.

From the government responses of compliance with all discovery, the court denied an order for discovery. At the trial on January 6th it was discovered that the scientific reports of Steven Martin as to whether the sites were on private property or federal property as would be necessary for proof of a violation of the Antiquities Act was not disclosed in violation of 28 U.S.C. 16 (a) (1) (D) of the Federal Rules of Criminal Procedure and representation made that there was no such proof. A map reflecting the purported location of the sites relative to federal and private property was also admitted over objection contrary to 28 U.S.C. 16 and as being hearsay. A xerox copy of the general location provided to the defendants reflected that the prosecution intentionally removed designations on the copy furnished the defendants as to the precise locations of where the sites were located relative to Federal and Private Property and the signs constructed by the Government informing the public they were entering private property. The Bill of Particulars requested information as to the exact location of the digging sites to Federal and private property. At trial it was also discovered that the prosecution had intentionally suppressed statements made by the defendant May recorded in government witness reports and testified to over objection at trial, contrary to 28 U.S.C. 16 (a) (1) (A) of the Federal Rules of Criminal Procedures.

28 U.S.C. 16 (a) (1) (A) (C) (D) of the Federal Rules of Criminal Procedure mandate the proper discovery of scientific test experiments made in the possession of the government, require the disclosure of the map reflecting the location of the sites to the defendants and the defendants' statements. The action by the prosecution in repeatedly misrepresenting orally and in writing to the court and to the defendants that all discovery requested by the defendants had been made and that there were no scientific tests or experiments made and physically removing the exact locations of the sites from the copy of the map furnished to the defendants, reflects the intentional nature of the suppression by the Asst. U.S. Attorney. Testimony reflected that the large federal signs saying the public was entering into private property placed on roads both leading into and out of the roads to the sites could only be placed when such properties had been

surveyed. Since there is no federal law against digging or excavating on private property, determination of this issue was critical to a fair trial being accorded the defendants. Allowing the use by the U.S. Attorney's office of evidence the existence of which has been misrepresented is in violation of the mandatory rules as to discovery and totally frustrates their purpose.

The suppression of the defendants' statement recorded by federal officers should have been furnished pursuant to the motion for discovery. The refusal to provide such information and the affirmative statements by the Assistant U.S. Attorney that all such information had been furnished obviously prejudiced the defendants' ability to properly prepare themselves for trial, prepare for cross examination and prepare for rebuttal testimony if necessary. The rationale of requiring discovery is well expressed in Jenks v. United States, 353 U.S., 657, 1 L Ed 2d 1103, 77 S. Ct. 1007 (1957) where it is expressed the interest of the United States in a criminal prosecution should not be to win the case but that justice be done. A trial that could in a real sense been termed fair was prevented by the intentional suppression of evidence and the misrepresentation of its existence by the Assistant U.S. Attorney. Trial by surprise while reaching desired result by the U.S. Attorney's office, somehow fails where at the expense of a fair trial.

IV

Where the uncontradicted evidence reflects that confessions and the evidence of counts 3-11 was obtained through threats and promises, the District Court's refusal to suppress such items should be reversed. While an appellate court will not review disputed contested facts, uncontroverted testimony should be accepted as true by the appellate court. An appellate court should not permit uncontradicted testimony of a witness to be discarded or disregarded arbitrarily or capriciously. McMillan v. Keck 260 P 1079, 82 Colo 434; Cooke v. Real Estate Trust Co. 22 A 2d 554 180 Md 133; Acuff v. Allen 191 SW 2d 196 28 Tenn App. 451; Proffitt v. Providence Washington Ins. Co. 234 SW 2d 894 Aff. 239 SW 2d 379 150 Tex 207; Watwood v. Steur 201 Pa4 460, 86CA 2d 40c; Barth v

Adelstein 152 p2d 498, 66 CA 2d 406; Burdock v. Wittich 156 P2d 90, 46 CA 2d 456; Frank v. Wright 205 SW 434, 140 Ten 535; Carpenter Steel Co. v. Pellequin 46 CA Rptr 502 237 CA2d 35; Calvert v. London 210 NE2 376, 137 Ind app 595.

The uncontradicted testimony reflects the defendants' confession and evidence of counts 3-11 were obtained through what amounted to threats and promises. The statement of Mr. May was obtained while at the City police station; and while Mrs. May was refused admittance to the interview that lasted up to two hours. Mr. May thought the Miranda rights allowed him the right to remain silent and the right to an attorney but did not understand the information would be used against him, in light of the promises of leniency made him. Although the Officer denies making threats and promises, the uncontradicted testimony as to what was told the defendants May and Smyer would be considered as threats and promises by any reasonable person. It is testified that the officer told the defendant May that he could have an archeologist come into the site and say the damages done on it could run as high as $30,000 and he could be prosecuted for the damages, and that May could also be charged with a felony for wrongful possession of a firearm. The officer admits discussing another crime, admits having turned over May's rifle to Alcoholic, Tobacco and Firearm's people and admits telling May that possession of the same could be considered a felony. May testifies that Dresser told him that if he cooperated 100 percent, Dresser would go with him and would recommend leniency to the court. It is uncontradicted that Officer Dresser indicated to both defendants that they would probably only get a fine and no sentence, that the government had an unlimited amount of money and that things would go smoothly if they cooperated 100 percent and that they could confiscate and tie up May's truck for 4 to 5 years if they didn't cooperate. May's initial cooperation earned the release of the truck. The District Court denied the defendants' motion to suppress at the evidentury hearing on December 6, 1978.

Respectfully submitted,

Frederick H. Sherman
Box 850
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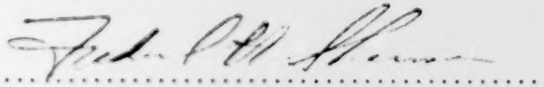
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Frederick H. Sherman, do hereby certify as counsel for petitioner herein, that on the 30th day of May, 1979, I sent the foregoing Petition for Writ of Certiorari to the Solicitor General's office by mailing, first class airmail postage prepaid.

Dated this 30th day of May, 1979.



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APPENDIX "A"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
vs.	)	Nos. 78-1134
	)	78-1135
WILLIAM R. SMYER and BYRON R. MAY, Defendants-Appellants.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. 77-284-CR)

Robert Bruce Collins (Victor R. Ortega, United States Attorney, with him on the brief) for plaintiff-appellee.

Frederick H. Sherman (Sherman and Sherman, with him on the briefs) for defendants-appellants.

Before McWILLIAMS, BREITENSTEIN and McKAY, Circuit Judges.

BREITENSTEIN, Circuit Judge.

After trial to the court without a jury, the defendants-appellants were found guilty of each count of an eleven-count information charging violations of 16 U.S.C. S 433 which relates to American antiquities. They received 90-day concurrent sentences on each count.

The offenses occurred in the Mimbres Ranger District, Gila National Forest, New Mexico. Count I charges that, without permission from the Secretary of Agriculture, the defendants excavated a prehistoric Mimbres ruin at an archaeological site, herein designated as 250, which was inhabited about 1000-1200 A.D. Count II charges excavation of a ruin at a site designated as 251. Counts III through XI charge the appropriation from the ruins of specified objects of antiquity, 800-900 years old.

The two sites are about 300 yards apart and may be approached either from the north or the south. Forest Rangers had observed "very wide, deep-lugged" tire tracks at the sites. On October 29, 1977, a Forest Service Recreation Officer, Roybal, discovered that a vehicle with "wide, deep-lugged" tires had entered the northern road leading to the sites and had passed a Forest Service sign warning that the area was protected by the American Antiquities Act. Upon his request for assistance, Ranger Bradsby and Enforcement Officer Dresser came and the three followed the tire tracks to the ruins. They found freshly dug holes at each ruin, shovels, picks, a sifting screen, and a small pottery bowl. In an arroyo between the sites they found a four-wheel drive truck, the tires on which matched the earlier discovered tire marks. No one was present at the sites. The officers inventoried the contents of the truck and had it towed away. That evening defendant May came to Ranger Bradsby's home and said that "he had been scouting for deer and that his truck had been stolen." A few days later federal officers interviewed, and obtained statements from, both May and Smyer. The officers took some artifacts from Smyer's home without objection and later, on the execution of a search warrant, seized other pieces of Indian bowls.

Defendants urge that the Antiquities Act is unconstitutional because it is vague and uncertain. The Act, which was passed in 1906, provides:

> "Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or

> any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined a sum of not more than $500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court."

The claim of vagueness and uncertainty is based on the use in the statute of the words "ruin," and "object of antiquity." In United States v. Diaz, 9 Cir., 499 F.2d 113, 114-115, the Ninth Circuit held that "the statute, by use of undefined terms of uncommon usage, is fatally vague in violation of the due process clause of the Constitution." We respectfully disagree. In Diaz the charge was appropriation of objects of antiquity consisting of face masks found on an Indian Reservation. The masks had been made in 1969 or 1970. The government evidence was that " 'object of antiquity' could include something that was made just yesterday if related to religious or social traditions of long standing." Id. at 114. Those facts must be contrasted with the instant case where the evidence showed that objects 800-900 years old were taken from ancient sites for commercial motives. We do not have a case of hobbyists exploring the desert for arrow heads. See, Id. at 114. Defendants admitted visiting the sites on several occasions and May had sold Mimbres bowls to an archaeologist.

The charges here were the excavation of two ruins and the appropriation of several objects of antiquity. The defendants' attack can go only to "ruin" and "antiquity." A ruin is the remains of something which has been destroyed. Webster's New International Dictionary, 2d Ed., 1960, p. 2182, ruin (4). Antiquity refers to "times long since past." Id. p. 119, antiquity (1). When measured by common understanding and practice, the challenged language conveys a sufficiently definite warning as to the proscribed conduct. United States v. Petrillo, 332 U.S. 1, 8; see also United States v. Goeltz, 10 Cir., 513 F.2d 193, 196-197, cert. denied, 423 U.S. 830.

The case under consideration is not a "sit-in" case like Bouie v.

City of Columbia, 378 U.S. 347, a vagrancy case like Papachristou v. City of Jacksonville, 405 U.S. 156, nor an antipicketing case like Grayned v. City of Rockford, 408 U.S. 104. We are not concerned with the deprivation of any First Amendment right. In their briefs defendants charge selective enforcement, but their claim has no support in the record. The statute in question was designed for the protection of American antiquities. It affects the property of the United States and is well within the power over public lands given to Congress by the federal Constitution. Art. IV, S 3, cl. 2.

In assessing vagueness, a statute must be considered in the light of the conduct with which the defendant is charged. See United States v. National Dairy Products Corp., 372 U.S. 29, 32-33. The Antiquities Act gives a person of ordinary intelligence a reasonable opportunity to know that excavating prehistoric Indian burial grounds and appropriating 800-900 year old artifacts is prohibited. See, Grayned v. City of Rockford, 408 U.S. 104, 108. We find no constitutional infirmity in S 433.

The Gila National Forest was established in 1899. United States v. New Mexico, ——— U.S. ———, 98 S.Ct. 3012, 3013. The Secretary of Agriculture has jurisdiction over historic sites within forest reserves. 43 C.F.R. S 3.1(a). To bolster their claim that they did not know they were in the National Forest, defendants argue that the Department gave inadequate notice that the two sites were on government land. The tire tracks of the vehicle went by an Antiquities Act sign. When the defendants saw the forest officers, one of whom was in uniform, they fled. Each defendant in his statement to officer Dresser admitted that he had been to the site several times. Mimbres bowls were found in Smyer's home. The trial court rejected the defendants' claim that they believed they were on private property. The overwhelming evidence shows violations of S 433.

Defendants claim that they were wrongfully denied a jury trial in violation of the Sixth Amendment. In Baldwin v. New York, 399 U.S. 66, 69, the Court said:

> "(N)o offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized."

The maximum penalty authorized by the Antiquities Act is 90 days imprisonment plus a fine of $500. Violations of the Act are

petty offenses under 18 U.S.C. S 1. The information contained 11 counts, each of which was charged as a separate offense. Each defendant was found guilty of each count. If consecutive sentences were imposed, the potential existed of 990 days imprisonment. The court sentenced defendants to 90 days on each count with the sentences to run concurrently.

The case was set for trial in Albuquerque, New Mexico on December 12, 1977. By written motion the defendants requested that the trial be held in Las Cruces, New Mexico. The court then set the trial for January 9 in Las Cruces. The defendants requested a jury. The court said that no jury would be available in Las Cruces and that the defendants could have a jury trial in Albuquerque on January 23. After some discussion the defendants and their counsel each signed waivers of jury trial. Government counsel also signed waivers and they were approved by the court. The record shows that the waivers were made knowingly, voluntarily and with the approval of competent counsel. See Adams v. United States, 317 U.S. 269, 275-278.

On this appeal defendants assert that they could not have a fair trial in Albuquerque. The record contains nothing to sustain this contention. In the trial court, defendants claimed that they could not afford a trial in Albuquerque. At the sentencing the trial court, with regard to this contention, said it "is simply not a fact." The waivers were made freely and intelligently and defendants are bound thereby.

In any event, defendants' reliance on Codispoti v. Pennsylvania, 418 U.S. 506, is misplaced. That case held that where consecutive sentences aggregating more than six months are imposed, defendant has a right to a jury trial. Here, concurrent sentences of less than six months were imposed. Where the actual sentence for multiple petty offenses is less than six months, there is no jury trial right. See, Muniz v. Hoffman, 422 U.S. 454, 475-476, and Taylor v. Hayes, 418 U.S. 488, 495-496. Scott v. Illinois, ——— U.S. ———, decided March 5, 1979 which deals with a defendant's right to counsel, is consistent with this view.

Defendants assert that the government did not comply with Rule 16, F.R.Crim.P., relating to discovery and inspection. At the trial much controversy arose over the government's compliance with a defense motion for discovery. One dispute related to a map

of the area in which the antiquity sites were located. The defense claimed that they did not know that they were on government property. A land surveyor presented an area map. The defense claims that they did not receive an exact copy and that the evidence given by the surveyor included scientific tests or experiments within the purview of Rule 16 (a) (1) (D). We are not impressed. We are convinced that the government complied with Rule 16. The record sustains the government's contention that the defendants knew they were on government land. If there was any misunderstanding about the map, the defendants were not prejudiced.

The defendants assert that the statements which they made to the officers should have been suppressed. The first complaint relates to statements of May to officer Bradsby on the evening that the officers impounded the truck. May came to Bradsby's home to inquire about the truck which, he said had been taken while he was "scouting for deer." Bradsby told him that the truck had been impounded. All the officer did was to answer defendant May's questions. Bradsby's testimony was properly received.

Officer Dresser separately interviewed Smyer and May. Neither was in custody at the time. Dresser gave each the required Miranda warnings and each signed a "Waiver of Rights." Each defendant was educated, intelligent, and under no compulsion. Dresser denied defendants' claims of threats and promises of leniency. Credibility is a matter for the trier of the facts. The court chose to believe Dresser. The defendants' statements were properly received.

The next objection goes to the receipt in evidence of the tangible objects which are the bases of Counts III to XI. During his interview with officer Dresser, May admitted digging at the ruins and selling two bowls. May offered to return the artifacts. At Smyer's home, May selected a number of artifacts from a collection and turned them over to the officer. Later the officer returned to Smyer's home with a search warrant and seized 31 bowls. A government expert testified that certain bowls were "all Mimbres classic or Mimbres Black on White Bowls." A shard found at the site fitted one of the bowls. A government expert placed the value of the artifacts taken by the defendants at about $4,000. The sites were prehistoric ruins inhabited by Mimbres

Indians, a sub-group of the Mogollon culture, from about 1000 to 1200 A.D., and the bowls were made sometime during that period. The questioned evidence was either given voluntarily to the officer or obtained by a search warrant of unquestioned validity. The bowls were adequately identified with the site, both by physical evidence and the admissions of the defendants. The evidence was properly received.

Defendants object to the receipt in evidence of a photograph of defendant May, seized by the officers during an inventory search of the truck. The photo showed May standing with a skull on his head and on each shoulder. He was holding skeletal bones in his hands. The evidence showed the presence of skeletal bones at the sites. On cross-examination May said that the photo was of him.

After the officers found the truck, they investigated the surrounding area and found no one. They decided to impound the truck and made a routine inventory of its contents. While doing so, officer Roybal lowered a sun visor, and the questioned photo fell down. The routine inventory protected the owner's property while in police custody, protected the officers against claims and disputes and against potential danger. South Dakota v. Opperman, 428 U.S. 364, 368-372, sustains the actions of the officers. They had reasonable cause to connect the truck with the excavations at the sites, and it had been abandoned. The seizure of the photo was proper. The evidence showed that the picture had been taken at site 250. The picture connected May with the site and was properly received in evidence.

Ranger Bradsby testified that the special-use permits, which authorized exploration of antiquity sites, were kept in his office and that neither May nor Smyer had a permit. The government introduced a computer print-out which named those who had the necessary permits. The introduction of the print-out is said to violate the Rules of Evidence, particularly Rule 802 (hearsay) and 602 (witness-lack of personal knowledge). The government says that the print-out is admissible under Rule 803(6) (Records of regularly conducted activity). The controversy need not be decided because other evidence showed that defendants did not have a permit, and they did not claim to have one. The government did not need to offer the print-out to prove its case, and the defendants were not prejudiced by its receipt.

Affirmed.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CRIM. NO. 77-284
WILLIAM R. SMYER and BYRON R. MAY, Defendants.	)	

ORDER

This matter coming on for consideration upon the Motions of defendants to dismiss, for a bill of particulars, for discovery, to suppress evidence and for the return of seized property, and the Court having considered the evidence adduced at the Motion hearing, the memoranda filed, together with the entire file in this cause, it is concluded that the Motions are disposed of as follows:

One portion of defendants' motion to dismiss is based on the theory that the Antiquities Act, 16 U.S.C. S 433, under which defendants are charged, is unconstitutionally vague.(1) It is defendants' position that regardless of what it is that they are alleged to have done, a person of ordinary intelligence who "explores the desert and the forest (sic) for arrowheads, chards

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(1) The Act provides as follows:
Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situate on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum not more than $500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

(pieces of pottery) (or) old bottles" cannot anticipate whether the objects he finds fall within the scope of the words "any historic or prehistoric ruin or monument, or any object of antiquity." Defendants' basic argument is that they can easily imagine hypothetical situations in which it would be difficult to determine whether a particular course of conduct violates the Act and that, accordingly, the Act is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

The proper analysis to be followed under the circumstances(2) is suggested by United States v. National Dairy Products Corp., 372 U.S. 29 (1926), in which the Supreme Court considered an attack upon S 3 of the Robinson-Patman Act, 15 U.S.C. S 13a, for vagueness. In that case National Dairy had been indicted for selling milk "at unreasonably low prices for the purpose of destroying competition." The indictment specified that National Dairy had intentionally sold milk below cost. National Dairy moved to dismiss the Robinson-Patman counts on the ground that the statutory provision, "unreasonably low prices," was so vague and indefinite as to violate the due process requirement of the fifth amendment.

National Dairy argued that S 3 should be tested solely "on its face" rather than as applied to the acts charged in the indictment. The government took the position that in considering an attack for vagueness the Court ought to determine whether the statute was unconstitutionally vague in its application to the conduct alleged

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(2) It is noted that the Antiquities Act is not a statute which infringes upon first amendment interests, as in Broaderick v. Oklahoma, 413 U.S. 601 (1972), or which, like a vagrancy ordinance, establishes "no standards governing the exercise of the discretion granted by the ordinance, (and thus) permits and encourages an arbitrary and discriminatory enforcement of the law." Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1971). Consequently, the increased scrutiny appropriate in considering a challenge for vagueness of a statute in either of these categories is not applicable here.

in the indictment, regardless of whether or not there is doubt as to the validity of the statute in all its possible applications. Before concluding that S 3 is not unconstitutionally vague, the Court explained the proper course for analysis:

> It is true that a statute attacked as vague must initially be examined "on its face," but it does not follow that a readily discernible dividing line can always be drawn, with statutes falling neatly into one of the two categories of "valid" or "invalid" solely on the basis of such an examination.
>
> We do not evaluate S 3 in the abstract.
>
> > "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases. . . ."
> > +++ United States v. Raines, 362 U.S. 17, 22 (1960).
>
> The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. +++ Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation. +++
>
> Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. +++ In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged. +++ In view of these principles we must conclude that if S 3 of the Robinson-Patman Act gave National Dairy and Wise sufficient warning that selling below cost for the purpose of destroying competition is unlawful, the statute is constitutional as applied to them. +++ We therefore consider the vagueness attack solely in relation to whether the statute sufficiently warned National Dairy and Wise that selling "below cost" with

> predatory intent was within its prohibition of "unreasonably low prices." (citations and footnotes omitted)

National Dairy Products Corporation, at 32-33.

Applying the same analysis to the facts in the present case, the question is whether the Antiquities Act gave defendants sufficient notice that the excavation of two 800 to 900 year old Mimbres Indian ruins and the appropriation from such ruins of seven classic Mimbres black and white bowls, a bone awl and a clay effigy, all of which are approximately 800 to 900 years old, was within the prohibition of the Act.

The words "ruin" and "monument" plainly require no guessing at their meaning, and the term "objects of antiquity" is no less comprehensible. Webster's Third New International Dictionary defines "antiquity" as "ancient times; times long since past," so an object of antiquity is an object out of or from ancient times or times long since past.

While it may not be possible to state in the abstract a precise number of years that must pass before something becomes an "object of antiquity," such exactitude is not required.

> "The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language (of a statute challenged for vagueness is acceptable if it) conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more."

United States v. Petrillo, 332 U.S. 1, 7-8 (1946). See American Communications Association v. Doud, 339 U.S. 382, 412 (1950). As we are "(C)ondemned to the use of words, we can never expect mathematical certainty from our language." Grayned v. City of Rockford, 408 U.S. 104, 110 (1971). The Antiquities Act must necessarily use words "marked by 'flexibility and reasonable breadth, rather than meticulous specificity,' " id., in order to

accomplish its purposes.

It is clear that the acts alleged in the information fall squarely within the proscription of the Antiquities Act. In light of what the evidence adduced at the motion hearing indicated was the defendants' experience with Indian artifacts and the age of the artifacts described in the information, the argument that the defendants could not reasonably have had notice from the language of the Antiquities Act that their alleged activities violated that statute is simply not credible. When measured by common understanding and practice, it is evident that the language of the Act is not indefinite, vague or uncertain.(3)

Another portion of defendants' Motion to dismiss is based on the

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(3) The Ninth Circuit Court of Appeals reached a contrary result in United States v. Diaz, 499 F.2d 113 (9th Cir. 1974). The defendant in that case was charged with violation of the Antiquities Act for having appropriated some face masks from an Indian reservation. Although it was established at trial that the masks involved were only 3 or 4 years old, a professor of anthropology testified that such masks were "objects of antiquity" because they were related to religious or social traditions of long standing. Accepting that definition, the court held that the Act was void for vagueness, for it gave no notice of the meaning of "undefined terms of uncommon usage." 499 F.2d at 115.

Presented with the facts of that case, the Ninth Circuit opted not to give the Antiquities Act a limiting construction, which would have avoided an "unnecessary pronouncement on constitutional issues, (and) premature interpretations of statutes in areas where their constitutional application might be cloudy." United States v. Raines, 362 U.S. 17, 22 (1960). As the Supreme Court has stated, "Our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 571 (1973). At any rate, it is extremely doubtful that Congress intended the Antiquities Act to prohibit the acquisition of objects manufactured as recently as 3 or 4 years ago.

theory that the information unfairly multiplies charges. This portion of the Motion is not well taken, and will be denied.

The Motions to suppress are not well taken, as the evidence adduced at the Motion hearing establishes that the items recovered were the fruits of valid searches, and the statements made by the defendants were given freely and voluntarily after defendants had been advised of their rights. The Motions to suppress will be denied.

The Motion for a bill of particulars is not well taken and will be denied.

Finally, with respect to the Motion for discovery, the government has stated that it either has complied or will comply with all of defendants' requests with the exception of a request for a list of government witnesses. Such information is not discoverable pursuant to Rule 16, and that portion of the motion will be denied; Now, Therefore,

IT IS BY THE COURT ORDERED that defendants' Motions to dismiss, for a bill of particulars, and to suppress evidence be, and hereby are denied, as is that portion of defendants' Motion for discovery which seeks discovery of a witness list.

UNITED STATES DISTRICT JUDGE

APPENDIX "C"

EXCERPTS FROM FEDERAL RULES OF CRIMINAL PROCEDURES

28 U.S.C. Rule 16. Discovery and Inspection.

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

(C) Documents and Tangible Objects. Upon

request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense, or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

28 U.S.C. Rule 18. Place of Prosecution and Trial.

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.

Title 16, Conservation

S 433. American antiquities.

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than $500 or

be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court. (June 8, 1906, ch. 3060, S 1, 34 Stat. 225.)

PROVISIONS OF THE UNITED STATES CONSTITUTION

ARTICLE III

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

ARTICLE (V)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public

danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE (VI)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U. S.
FILED
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JR., CLERK

No. 78-1900

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM R. SMYER AND BRYON R. MAY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 596 F. 2d 939. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1979. A petition for rehearing was denied on April 30, 1979. The petition for a writ of certiorari was filed on June 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the American Antiquities Act, 16 U.S.C. 433, is unconstitutionally vague as applied to the excavation and appropriation of 800-year old artifacts of a prehistoric Indian civilization.

2. Whether petitioners were denied their right to a jury trial.

3. Whether certain statements and physical evidence were improperly withheld from petitioners before trial or improperly admitted at trial.

STATUTE INVOLVED

The American Antiquities Act, 16 U.S.C. 433, provides:

> Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined a sum of not more than $500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

STATEMENT

After a jury-waived trial in the United States District Court for the District of New Mexico, petitioners were convicted on 11 counts of unlawful excavation of a prehistoric site and theft of specific objects of antiquity, in violation of the American Antiquities Act, 16 U.S.C. 433. Petitioners were sentenced to concurrent terms of 90 days' imprisonment on each count. The court of appeals affirmed (Pet. App. A1 to A7).

The evidence at trial showed that in October 1977 officers of the United States Forest Service stationed in the Gila National Forest, New Mexico, noticed signs of recent digging at a prehistoric Mimbres ruin. On October 29, 1977, an officer noticed new tire tracks leading past a Forest Service Antiquities Act sign to archaeological sites 250 and 251 (Tr. 24, 79, 117). Freshly dug holes and digging tools were found at one of the sites (Tr. 33-34, 81-83), and a pick-up truck whose tire tracks matched those seen entering the area was found in an arroyo between the two sites (Tr. 36, 116). The truck was registered to petitioner May (Tr. 40, 90, 117).

On the following day, May was interviewed by a special agent of the Forest Service. After signing a waiver of rights form (Tr. 92), May admitted that he and petitioner Smyer had been digging for artifacts at the sites and offered to return bowls which they had taken from the area (Tr. 92-94). The two men then proceeded to Smyer's house, where May gave the officer certain artifacts uncovered at the site (Tr. 94-96, Gov't Exhs. 13A-H). Smyer, after being informed of his rights, admitted that he had dug for artifacts at the site with May (Tr. 100). A subsequent warrant-authorized search of Smyer's house uncovered 31 Mimbres bowls (Tr. 102). The recovered artifacts were estimated to date from 1000-1200 A.D. and to have a wholesale value of at least $1,000 each (Tr. 129-131, 138).

In his defense, May admitted that he excavated the artifacts but contended that he was unaware that the area was federal property (Tr. 181-182, 187, 188). Petitioner Smyer did not take the stand.

ARGUMENT

1. Petitioners argue (Pet. 6) that the American Antiquities Act, 16 U.S.C. 433, is unconstitutionally

vague because it fails to define the term "object of antiquity." Whatever merit this claim might have in other situations, it has no force in this case.

As both the district court and the court of appeals noted, a statute that is impermissibly vague as applied in some contexts may nonetheless provide fair warning that other conduct falls within its scope (Pet. App. A3-A4, B2 to B5). Where, as here, the statute does not broadly trench upon First Amendment freedoms, "one to whom application of [the] statute is constitutional will not be heard to attack the statute on the ground that impliedly it might be also taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines*, 362 U.S. 17, 21 (1960). See also *United States* v. *Powell*, 423 U.S. 87 (1975); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975); *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963).

These settled principles govern here, for it is beyond question that an 800-year old archaeological artifact, created by a prehistoric civilization, is an "object of antiquity" within the meaning of the statute. The statute thus gave fair warning of its clear intent to forbid the excavation and appropriation of the objects taken by petitioners in this case.[1] Even if the statute was vague as

[1]The history of the statute further demonstrates Congress' intent to protect these artifacts from plunder and destruction. "[I]n view of the fact that the historic and prehistoric ruins and monuments on the public lands of the United States are rapidly being destroyed by parties who are gathering them as relics and for the use of museums, and colleges, etc., your committee are of the opinion that their preservation is of great importance." S. Rep. No. 3797, 59th Cong., 1st Sess. (1906). See also comments by Rep. Lacey, 40 Cong. Rec. 7888 (1906), stating that the purpose of the bill "is to preserve these old objects of special interest and the Indian remains in the pueblos of the Southwest * * *."

applied to the excavation of less ancient objects of less significant cultural origin, the statute provided ample notice that the conduct charged in this case was unlawful. See *Morissette* v. *United States*, 342 U.S. 246 (1952); *United States* v. *Mazurie*, *supra*, 419 U.S. at 551-553.

United States v. *Diaz*, 499 F. 2d 113 (9th Cir. 1974), on which petitioners rely (Pet. 6), is distinguishable on this very basis. In *Diaz*, the defendant was charged with appropriating Indian face masks that were only three or four years old at the time of the theft. The court of appeals could have reversed the conviction in *Diaz* simply on the ground that objects only four years old are not "objects of antiquity" under any reasonable interpretation of the statute.[2] Instead, although the constitutionality of the statute was neither briefed nor argued on appeal, the court held that the statute failed to afford notice of its application to objects of such recent origin and was therefore "fatally vague * * *." *Id.* at 115. In ruling as it did, the court of appeals in *Diaz* violated the fundamental principle that a court should "never anticipate a question of constitutional law in advance of the necessity of deciding it * * *." *Liverpool, New York, & Philadelphia Steamship Co.* v. *Commissioners of Immigration*, 113 U.S. 33, 39 (1885). See also *United States* v. *Raines*, *supra*, 362 U.S. at 21. Moreover, the decision antedated this Court's reversal of a similar decision by another panel of the Ninth Circuit in *United States* v. *Powell*, *supra*. Thus, there is little reason to suppose that the approach taken in *Diaz* would be perpetuated by the Ninth Circuit if it were confronted with the same issue again today. At most, therefore, *Diaz*

[2]The government contended in *Diaz* that the face masks were "objects of antiquity" because they "related to religious or social traditions of long standing." 499 F. 2d at 114.

stands as a ruling that the statute is unconstitutionally vague as applied to objects of recent origin, a holding not in conflict with the decision in this case. There is no basis for concluding that, because the statute does not fairly warn that a four-year old object is an "antiquity," the statute is similarly vague as applied to the 800-year old archaeological artifacts stolen in this case.[3]

2. Petitioners' case was originally set for trial in Albuquerque, New Mexico. Prior to trial, however, petitioners requested as a matter of convenience that the trial be held in Las Cruces, New Mexico, instead. The district court agreed to transfer the trial to Las Cruces but informed the defendants that a jury would not be available there on the scheduled trial date. Petitioners chose to have the trial in Las Cruces on the scheduled date anyway, and they therefore signed jury-trial waivers that were approved by the court (Pet. App. A5).

Petitioners now contend (Pet. 6-7) that they were denied the right to a jury trial. The court of appeals correctly concluded, however, that this "record shows that the waivers were made knowingly, voluntarily and with the approval of competent counsel" (Pet. App. A5). Petitioners chose to waive their right to a jury trial to obtain the perceived advantage of going to trial in Las Cruces on the scheduled trial date.

Nor were petitioners entitled by law to have their trial in Las Cruces rather than Albuquerque. Rule 18 of the

[3]We note, moreover, that Congress has before it legislation (the "Archaeological Resources Protection Act of 1979") that will specifiy the age of archaelogical resources covered by the Antiquities Act. The House version limits its application to objects at least 100 years of age (H.R. 1825), while the Senate version would apply to any item at least 50 years of age (S. 490). See H.R. Rep. 96-311, 96th Cong., 1st Sess. 7 (1979); S. Rep. 96-179, 96th Cong., 1st Sess. 2, 7 (1979).

Federal Rules of Criminal Procedure required that petitioners be prosecuted "in a district in which the offense was committed." But, under Rule 18, a defendant may be tried anywhere within that district and has no right to one location over another. *United States* v. *James*, 528 F. 2d 999, 1021 (5th Cir. 1976), cert. denied, 429 U.S. 959 (1977); *United States* v. *Fernandez*, 480 F. 2d 726, 730 (2d Cir. 1973). Since New Mexico constitutes only one judicial district and is not further separated into divisions (28 U.S.C. 111), petitioners' prosecution was properly initiated in Albuquerque, and they had no right to be tried in Las Cruces instead.

3.*a.* Petitioners contend (Pet. 8-10) that the prosecutor deliberately withheld evidence that bore on the question whether archaeological sites 250 and 251 (where petitioners appropriated the artifacts) were on federal land. But before trial petitioners were told the exact geographic location of the two sites in response to their motion for a bill of particulars and were also given a xerox copy of a United States Geological Survey map of the area within the Gila National Forest that included the two sites. Petitioners argue (Pet. 9) that they should also have received, prior to trial, a copy of a map containing arrows and markings made by a government land surveyor, which was introduced at trial to indicate to the court the precise location of the sites.[4] Those markings, however, do not constitute, as petitioners contend, "scientific tests or experiments" discoverable under Fed. R. Crim. P. 16(a)(1)(D). Nor was the government obligated to furnish petitioners with a summary of the

[4]Petitioners' claim that the government altered the map furnished them, rather than altering by subsequent markings the map that was introduced at trial, is substantiated neither by the record nor by any logical reasoning.

anticipated testimony of the government's witness as to the location of the sites. Fed. R. Crim. P. 16(a)(2); *United States* v. *Krohn*, 558 F. 2d 390, 394 (8th Cir.), cert. denied, 434 U.S. 868 (1977); *United States* v. *Mitchell*, 540 F. 2d 1163, 1166 (3d Cir. 1976), cert. denied, 429 U.S. 1099 (1977).

b. Soon after his parked truck was discovered and seized by federal officers near the archaelogical sites, petitioner May reported to one of the rangers that, while he had been scouting for deer, his truck had been stolen (Tr. 41). Petitioners now contend (Pet. 10) that the government deliberately withheld that statement prior to trial. However, petitioner May's voluntary and unsolicited report to the government, which was not transcribed or signed, is not a statement "in response to interrogation by any person known to the defendant to be a government agent," as specified by Fed. R. Crim. P. 16(a)(1)(A). *United States* v. *Green*, 548 F. 2d 1261, 1267 (6th Cir. 1977). The government was therefore not required to disclose the statement to petitioners before trial. Moreover, the statement did not bear directly on any issue of guilt or innocence, and its pre-trial disclosure would not have affected the outcome of the trial. *Brady* v. *Maryland*, 373 U.S. 83 (1963). See *United States* v. *Agurs*, 427 U.S. 97, 112-114 (1976). There is thus no basis for further review of petitioners' claim.

c. Petitioners contend (Pet. 10-11) that statements and physical evidence introduced at trial were impermissibly obtained from them by threats and promises made by a government agent. Petitioners' claims, however, were disputed in a pre-trial proceeding by Wydler Dresser, a special agent with the United States Forest Service, who testified that he had read aloud the waiver of rights form and advised petitioners of their *Miranda* rights before

taking statements from them. Agent Dresser also denied that he had threatened either petitioner with additional or more severe charges if they refused to cooperate or that he had promised leniency in exchange for their statements (Dec. 6, 1977, Tr. 30-35). Agent Dresser's testimony was substantiated by petitioner Smyer, who testified that the agent had refused to predict what sentence they might receive and that he and Agent Dresser discussed petitioner's *Miranda* rights and that petitioner Smyer understood them before he signed the waiver form and gave his statement (Dec. 6, Tr. 20-22).[5] In these circumstances, the court of appeals correctly held (Pet. App. A6) that the district court did not err in concluding that Agent Dresser did not coerce or threaten petitioners. This factual determination does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]Both petitioners signed the waiver form (Gov't Exhs. 14, 15).